Supreme Court, U.S.
FILED
OCT 5 1995
CLERK

No. 95-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL NUSSBAUM *
A. KATHERINE TOOMEY
NUSSBAUM & WALD
One Thomas Circle, Suite 200
Washington, D.C. 20005
(202) 833-8900

Counsel for Respondent Court Appointed Fiduciaries of BCCI

* Counsel of Record

October 5, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13pp

PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the petition for writ of certiorari, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, through their Court Appointed Fiduciaries, who were Defendants-Appellees in the court below, are Respondents in this proceeding.

CORPORATE LISTING PURSUANT TO RULE 29.6

Pursuant to S. Ct. Rule 29.6, the following is a list of parent corporations of the Respondents and all subsidiaries of which the Respondents were not registered owners of 100% of the shares. The list includes information as of July 5, 1991, the day on which the Respondent corporations were taken under regulatory control.

BCCI Holdings (Luxembourg), S.A.

A. Parent Corporation: None

B. Subsidiaries of which BCCI Holdings (Luxembourg), S.A. was not registered owner of 100% of the shares:

1. ItalFinance International SpA
2. BCCI (Nigeria) Limited
3. BCCI (Swaziland) Limited
4. BCC (Zimbabwe) Limited
5. BCC Cameroon S.A.
6. BCC (Emirates) U.A.E.
7. BCC (Misr) S.A.E.
8. BCC (Hong Kong) Limited
9. BCCI Finance International Limited
10. Banco de Credito e Commercio de Investmento S.A.
11. BCC S.A.E.
12. National Bank of Oman
13. BCC Ghana Limited
14. BCC S.A. (Argentina)
15. PT BCC Pratama Leasing Indonesia
16. BCCI Leasing (Malaysia) Sdn. Bhd.

17. Kuwait International Finance Company S.A.K.

18. Banco de Commerce et de Placements S.A.

Bank of Credit and Commerce International, S.A.

A. Parent Corporation: BCCI Holdings (Luxembourg), S.A.

B. Subsidiaries of which Bank of Credit and Commerce International S.A. was not registered owner of 100% of the shares: None

Bank of Credit and Commerce International (Overseas) Limited

A. Parent Corporation: BCCI Holdings (Luxembourg), S.A.

B. Subsidiaries of which Bank of Credit and Commerce International (Overseas) Limited was not registered owner of 100% of the shares: None

International Credit and Investment Company (Overseas) Limited

A. Parent Corporation: ICIC Holdings Limited

B. Subsidiaries of which International Credit and Investment Company (Overseas) Limited was not registered owner of 100% of the shares: None

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	i
CORPORATE LISTING PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	2
A. The Liquidation Of BCCI	2
B. "Ring-Fencing" Of Unincorporated Branches	4
C. Proceedings Below	5
1. The District Court Decision	7
2. The Court of Appeals Decision	7
REASONS FOR DENYING THE WRIT	7
ARGUMENT	8
I. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUITS AND THE COURT OF APPEALS OF NEW YORK CONCERNING THE NARROW ISSUE PRESENTED BY THIS CASE	8
II. THE DECISION BELOW WAS CORRECT	11
A. The United States Has The Greatest Interest In Applying Its Own Law	12
B. Petitioner Could Adduce No Facts That Would Permit The Court To Find That It Is An Independent Corporate Entity And A Hearing Was Properly Denied	13
III. INTERNATIONAL COMITY SUPPORTS RECOGNITION OF THE COURT APPOINTED FIDUCIARIES AS CORPORATE REPRESENTATIVES, NOT THE PETITIONER	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 12
Cunard S.S. Co. v. Salen Reefer Services AB, 773 F.2d 452 (2d Cir. 1985) 16
Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896) 15-16
DeYoung v. Beddome, 707 F. Supp. 132 (S.D.N.Y. 1989) 15
Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754 (10th Cir. 1989) 16
Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291 (1st Cir. 1988) 9
First Nat'l Bank v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981) 10, 11, 14
First Nat'l City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959) 11
Hilton v. Guyot, 159 U.S. 113 (1895) 15
In re Saybrook Mfg. Co., 963 F.2d 1490 (11th Cir. 1992) 17
In re Sugar Indust. Antitrust Litig., 579 F.2d 13 (3d Cir. 1978) 9
Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) 15
Poole v. Elliott, 76 F.2d 772 (4th Cir. 1935) 16
Salzstein v. Bekins Van Lines, Inc., 747 F. Supp. 1281 (N.D. Ill. 1990) 9
Sokoloff v. National City Bank, 224 N.Y.S. 102 (Sup. Ct. 1927) 9-10, 13-14
Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971) 16-17
Taylor v. United States, 495 U.S. 575 (1990) 12
Trinh v. Citibank, N.A., 850 F.2d 1164 (6th Cir. 1988) 9
United States ex rel. White v. Knox, 111 U.S. 784 (1884) 16
United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) 9
United States v. First Nat'l City Bank, 379 U.S. 378 (1965) 11

TABLE OF AUTHORITIES—Continued

	Page
United States v. Goldberg, 830 F.2d 459 (3d Cir. 1987)	12
Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981)	9
Western Beef, Inc. v. Compton Inv. Co., 611 F.2d 587 (5th Cir. 1980)	9
Statutes:	
12 U.S.C. § 24	11
12 U.S.C. §§ 91 & 194	15
12 U.S.C. §§ 601-04	11
12 U.S.C. §§ 611-32	11
18 U.S.C. § 1961, *et seq.*	12
18 U.S.C. § 1963, *et seq.*	2, 5, 7, 14
S. Ct. Rule 29.6	ii, iii
Miscellaneous:	
1A A.D. Kowalsky, et al., *Michie on Banks and Banking*, Ch. 2, § 29 (1993)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-360

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court Appointed Fiduciaries of BCCI Holdings (Luxembourg), S.A. ("BCCI Holdings"), Bank of Credit and Commerce International, S.A. ("BCCI SA"), Bank of Credit and Commerce International (Overseas) Limited ("BCCI Overseas"), and International Credit and Investment Company (Overseas) Limited ("ICIC Overseas") oppose Petitioner's request for a writ of certiorari. Petitioner's argument that this Court should resolve a perceived conflict between the New York Court of Appeals and the federal courts does not withstand analysis. There is no conflict between these courts, and even if there were conflict, certiorari would not be warranted. Petitioner's substantive arguments asserting error below are similarly without basis and do not in any event justify granting the petition in this case.

Petitioner, the Liquidation Commission for BCCI (Overseas) Limited, Macau, is a local liquidator appointed by officials in Macau to represent the unincorporated branch of BCCI Overseas in Macau. Petitioner claims ownership and seeks the release under 18 U.S.C. § 1963(*l*) of certain funds formerly held by BCCI Overseas in United States banks in accounts maintained by the corporation containing the designation "Macau." As described more fully below, those funds were forfeited under a Plea Agreement along with all other BCCI Overseas assets located in the United States.

BCCI Overseas was taken under regulatory control on July 5, 1991, along with the other corporate defendants. The Grand Court of the Cayman Islands, where BCCI Overseas is incorporated, subsequently placed the corporation under the control of the Court Appointed Fiduciaries. The Court Appointed Fiduciaries have sole authority to act with respect to corporate assets of BCCI Overseas worldwide. Locally appointed representatives of unincorporated branches lack standing to challenge forfeiture of corporate assets outside their jurisdictions. Moreover, the assets in question, under the legal standards which appellants have conceded apply to this case, belong to BCCI Overseas.

STATEMENT OF THE CASE

Because the unique facts and procedural history of this case confirm the correctness of the rulings of the courts below, the Court Appointed Fiduciaries expand upon the recitation set forth by the Court of Appeals.

A. The Liquidation Of BCCI

From 1972 to July 1991, the BCCI Group was a worldwide banking organization, operating in sixty-nine countries. The parent company, BCCI Holdings, is a Luxembourg holding company which owned two principal

operating subsidiaries, BCCI SA and BCCI Overseas.[1] BCCI Overseas, which is incorporated in the Cayman Islands, had unincorporated branches in twenty-eight countries, including Macau. BCCI Holdings also owned a large number of separately incorporated subsidiaries which operated in numerous countries. Although Petitioner misleadingly refers to the Macau branch as a separate, foreign "bank," it was not separately incorporated. As in many countries, the branch in Macau was subject to local regulation.

On July 5, 1991, bank regulators in Luxembourg, the Cayman Islands, the United Kingdom, the United States and elsewhere shut down the worldwide operations of the BCCI Group. Shortly thereafter, courts in Luxembourg and the Cayman Islands, where Respondents were incorporated, and in the United Kingdom, where BCCI SA had its major banking operations, appointed fiduciaries to oversee the global liquidations of BCCI. Since their appointments, the Court Appointed Fiduciaries have been working together to realize and consolidate all of the assets of the BCCI Group worldwide, in order to distribute those assets ratably to innocent creditors and depositors of BCCI around the world.

Directly following the coordinated seizure of BCCI in Luxembourg and the Cayman Islands, local banking regulators in various countries in which the BCCI Group had branches seized local operations, and, in some cases, appointed local liquidators to administer assets under local law. At the outset of the liquidation, the Court Appointed Fiduciaries attempted to obtain the participation of unincorporated branches in the global pooling of assets for distribution to creditors, including the creditors of BCCI Overseas.

---

[1] Respondent ICIC Overseas was a related corporation, whose affairs were controlled by Agha Hasan Abedi and Swaleh Naqvi, former corrupt senior management of BCCI.

Universality of liquidation of corporations is the law in the Cayman Islands, Luxembourg, and the United Kingdom, and is necessary to achieve an equitable distribution of assets to victims. As stated by the Vice-Chancellor of the High Court of Justice in England:

> The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions . . . . It will require the most difficult and complicated attempts at cooperation between the different national jurisdictions which I hope will be forthcoming.

Appendix to the Court Appointed Fiduciaries' Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opp. App.") at 7a.

B. "Ring-Fencing" Of Unincorporated Branches

In contrast to the principle of universality, "ring-fencing" is the practice of treating a branch of a corporation as though it were a entity separate from the corporation itself. Where a branch of an international banking corporation is liquidated in a country applying ring-fencing, the assets of the branch are applied exclusively to pay off creditors of that branch in priority to all creditors of other branches. According to the petition, the law of Macau requires ring-fencing, and, as a local liquidator, Petitioner seeks to apply ring-fencing to benefit the creditors of the Macau branch at the expense of the global pool.

In general, when any business enterprise ceases to function, certain divisions of the business when viewed in isolation will have more access to cash and liquid assets than others. Because of the widespread financial irregularities in BCCI, the distribution of assets at the time of closure was, to some extent, independent of the recorded assets and liabilities on the books of the branches. Not surprisingly, neither the Petitioner, nor any of the other branch

liquidators, have challenged the Court Appointed Fiduciaries' assumption of financial responsibility for the BCCI entities' crimes, but each challenges the forfeiture of accounts which, it is claimed, "belong" to particular unincorporated branches of BCCI Overseas.

C. Proceedings Below

In connection with a series of criminal and regulatory charges filed against BCCI in the United States, the Court Appointed Fiduciaries and representatives of the Department of Justice, the District Attorney of New York, the Federal Reserve and numerous other state and federal agencies negotiated a comprehensive Plea Agreement, which was signed and filed in the District Court on December 19, 1991. Opp. App. at 11a-39a. The Plea Agreement was presented to and approved by courts in Luxembourg and the Cayman Islands supervising the worldwide liquidation of the BCCI entities.

The Plea Agreement required the BCCI corporations including BCCI Overseas, through the Court Appointed Fiduciaries, to plead guilty to federal and state criminal charges and to agree not to contest charges filed by the Federal Reserve. It further provided that the District Court would enter an order pursuant to 18 U.S.C. § 1963 (a) forfeiting all BCCI assets located in the United States. Under the Plea Agreement, the Attorney General agreed that half of the forfeited assets would be transferred to the Worldwide Victims and Creditors Compensation Fund administered by the Court Appointed Fiduciaries. The remaining half would be used by the Attorney General, in her discretion, for various enumerated purposes, including "restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries . . . for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI." Opp. App. at 22a-23a.

The Plea Agreement was recognized by the courts that approved it as the best settlement that could practically be obtained for the innocent depositors and creditors. It resolved all charges, eliminating the risk that *all* of BCCI's U.S. assets would be forfeited and retained by the United States and assuring that substantial assets would be made available to worldwide victims—including the depositors who the instant Petitioner purports to represent. The U.S. assets of BCCI could then be distributed with other assets in an orderly and fair manner through global proceedings, thereby preventing piecemeal and unfair distribution of assets to individual claimants at the expense of the general body of creditors and depositors worldwide.

In accepting the Plea Agreement, the District Court concluded:

> [T]he Plea Agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the Plea Agreement is that those extraordinary efforts, that amazing cooperation, shall continue.
>
> . . . .
>
> Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

Opp. App. at 43a-44a.

1. *The District Court Decision*

In rejecting Petitioner's claim, the District Court (Judge Joyce Hens Green) held that the Petitioner along with numerous other branch liquidators failed to satisfy the requirements of 18 U.S.C. § 1963(*l*)(2), which permits "[a]ny person, *other than the defendant*" to file a claim seeking return of forfeited property. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") at 8e (emphasis added). The District Court held that, "[b]ecause unincorporated divisions and their parents cannot be considered separate entities for the purpose of indictment, it would be anomalous to consider them separate entities for the purpose of determining standing to file a petition pursuant to § 1963(*l*)." Pet. App. at 14e.

2. *The Court of Appeals Decision*

A unanimous panel of the Court of Appeals for the District of Columbia Circuit affirmed the order of the District Court. The Court of Appeals rejected Petitioner's argument that the standing of the branch should be determined by application of the law of place in which the branch was located. The Court noted that this analysis could result in branches receiving differing treatment depending on where they were located. The Court rejected this notion, stating, "identically situated parties should not arbitrarily receive different treatment under the same federal statutory scheme." Pet. App. at 8d-9d.

REASONS FOR DENYING THE WRIT

Petitioner argues that this Court should resolve a perceived conflict between the New York Court of Appeals and the federal courts; this argument does not support the grant of certiorari. As recognized by both the Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, the conflict of authority is illusory. Moreover, even if there were a conflict, the grant of certiorari would not be warranted.

Petitioner's argument that an unincorporated branch should be treated as a separate juridical entity and should therefore not be subject to criminal penalties imposed on the corporation as a whole is manifestly incorrect. Petitioner's contention that separate bodies of foreign law should be applied to petitions brought by unincorporated branches located in foreign countries would lead to inconsistent and anomalous results, impairing the United States' principled and uniform enforcement of criminal forfeiture law. Moreover, Petitioner's attempt to reach outside its ring-fence to obtain assets for the benefit of certain branch depositors at the expense of depositors worldwide is in conflict with national policy. The courts below were correct in declining to accord comity to Petitioner's appointment and instead properly according comity to the appointment of the Court Appointed Fiduciaries.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUITS AND THE COURT OF APPEALS OF NEW YORK CONCERNING THE NARROW ISSUE PRESENTED BY THIS CASE.

The issue presented in this case is whether a branch of a bank is separate from the corporation as a whole for the purpose of applying a federal criminal forfeiture statute. Under both New York law and federal common law, a branch is considered part of the corporate whole for this purpose. Accordingly, there is no conflict between the New York Court of Appeals and federal courts on this issue.

Under federal common law, when the focus of analysis is the relation of the parent bank to its individual branches, multi-branch international banks are regarded as single entities. Such treatment of bank branches accords with the generally accepted principle in federal law that divisions of corporations, unless separately incorporated, are not legally distinct from the corporate entity as a whole.

E.g., In re Sugar Indust. Antitrust Litig., 579 F.2d 13, 18 (3d Cir. 1978) ("A division of a corporation is not a separate entity but is the corporation itself."); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (same applied in RICO prosecution), *cert. denied*, 459 U.S. 1105 (1983); *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 591 (5th Cir. 1980) (same); *Salzstein v. Bekins Van Lines, Inc.*, 747 F. Supp. 1281, 1282 n.1 (N.D. Ill. 1990) (division of corporation not capable of being sued separate from the corporation itself).

When international banks operate through branches rather than through separate corporate subsidiaries, the head office has ultimate responsibility and liability for the affairs of branches. *See, e.g.*, 1A A.D. Kowalsky, et al., *Michie on Banks and Banking*, Ch. 2, § 29 at 539 (repl. vol. 1993). This is particularly true if branches have closed. *See, e.g., Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988), *cert. denied*, 496 U.S. 912 (1990); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1303-04 (1st Cir. 1988); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

The seminal case, which is relied on by federal courts that have addressed this issue, is the ruling of the New York Supreme Court (affirmed by the New York Court of Appeals) in *Sokoloff v. National City Bank*, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (1928), and *aff'd*, 164 N.E. 745 (N.Y. 1928). As stated in *Sokoloff*:

> [W]hen considered with relation to the parent bank, [foreign branches] are not independent agencies; they are, what their name imports, merely branches and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the par-

> ent bank and their property and assets belong to the parent bank, although nominally held in the names of the particular branches.

224 N.Y.S. at 114.

The *Sokoloff* opinion also rejected the argument, which the Petitioner makes here, that because it is subject to local regulatory requirements, a foreign branch may become a separate entity for purpose of analyzing its relationship to the principal corporation:

> The fact that, for the privilege of doing business in Russia, the defendant was required to take out a charter for its Petrograd branch and submit to certain regulation as to the method of conducting its business, did not alter the relation of the Petrograd branch with the defendant.

Id. This reasoning has also been embraced by the federal courts. *See, e.g.,, First Nat'l Bank v. Banco Nacional de Cuba,* 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied,* 459 U.S. 1091 (1982).

The cases cited by Petitioner are inapposite. They do not address the relationship between the branch and the corporation, but rather address the interaction of branches with other branches. Pet. App. at 6d-7d and n.6. Consequently, there is no conflict between federal and New York state law on this issue.

Moreover, even if there were a conflict between state and federal law, this Court need not resolve it. There is no reason that the federal law should be required to conform to state law in interpretation of a *federal* statutory scheme. As a matter of federal policy, banks are treated as integrated corporations; branches are not treated as separate entities.

The federal statute that applies to U.S. banks with foreign branches reflects a consistent federal policy that a bank and its unincorporated branches, wherever they may be located, are a single entity. Federal Foreign Banking

Law, 12 U.S.C. §§ 601-04, 611-32. Foreign branches may maintain separate books of account pursuant to 12 U.S.C. § 604, but this is "nothing more than a 'bookkeeping' statute." *First Nat'l City Bank v. Internal Revenue Service,* 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960). "[F]ederal agencies and officials have long viewed a national bank and its branches as a single entity." *First Nat'l Bank v. Banco Nacional de Cuba,* 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied,* 459 U.S. 1091 (1982). Similarly, this Court noted in *United States v. First Nat'l City Bank,* 379 U.S. 378, 384 (1965), that a national bank "has actual, practical control over its [foreign] branches; it is organized under a federal statute, 12 U.S.C. § 24, which authorizes it 'To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons'—as one entity, not branch by branch." (citations omitted).

II. THE DECISION BELOW WAS CORRECT.

The Macau branch of BCCI Overseas is part of a single juridical entity—BCCI Overseas. Whether this Court applies the law of Macau, the law of the United States or the law of the Cayman Islands, it is undisputed that the Macau branch was not separately incorporated. Rather, the Petitioner contends that, because BCCI Overseas had to meet certain regulatory requirements in the establishment and management of its branch in Macau, the Macau branch should be treated as a separate juridical entity and be granted standing to assert its rights to certain bank accounts. Petitioner asserts that Macanese law should be applied to determine if the Macau branch is a separate entity. But such a result would make the construction of U.S. criminal statutes subject to the vagaries of multiple and conflicting foreign laws. This would be untenable.

A. The United States Has The Greatest Interest In Applying Its Own Law.

At issue on this petition is whether, under federal criminal forfeiture law, a single corporation is to be treated as a unitary entity or as a multiplicity of sub-entities, each having its criminal liability and the forfeitability of its assets analyzed separately. The Court of Appeals decided correctly that the "greatest interest" here belongs to the United States in the enforcement of its criminal laws, not in the vindication of Macau banking law in ring-fencing assets.

It is not a close question which jurisdiction has the "greatest interest" in this litigation. The United States has "uniquely federal interests" in the application of the RICO forfeiture statute and the interpretation of the word "defendant" in that statute, and this Court should accordingly apply federal common law to the issues raised here. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (federal common law applies to areas of "uniquely federal interests").

Courts have typically held that determination of criminal matters is based only on the law of the country where the crime is committed. *See, e.g., United States v. Goldberg*, 830 F.2d 459, 462 (3d Cir. 1987). For United States courts to apply foreign law—indeed, multiple and potentially conflicting foreign laws—to the construction of a federal criminal statute would lead to inconsistent and uncertain results in the enforcement of the criminal statute at issue, RICO, 18 U.S.C. § 1961, *et seq.* *Cf. Taylor v. United States*, 495 U.S. 575, 591-92 (1990) (interpretation of term "burglary" in federal criminal statute should not be based on varying state laws; such interpretation would lead to "odd results"). In this case, petitions were filed in the court below by thirteen separate branches of BCCI Overseas.[2] If this Court were to look

[2] Claims were also filed by one branch of BCCI SA and by five subsidiaries of BCCI Holdings. Separately incorporated subsidiaries have been differently treated.

to the law of the country in which each branch is located, different results could occur in the petition of the Panama branch liquidator, for example, as opposed to the petition of the Gabon branch liquidator, as opposed to the petition of the French branch liquidators.[3]

If as Petitioner urges, a corporation were to fracture into numerous sub-entities each of which was to have its conduct analyzed under a separate legal system, U.S. law enforcement would inevitably be impeded. In the case of BCCI, operating in sixty-nine countries, such a haphazard regime would lead to chaos. The uncertainty of result would be an anathema to the uniform and predictable enforcement of U.S. criminal statutes, and other federal statutory schemes involving international corporate defendants could be similarly implicated, including antitrust and securities laws. The interest of the United States in applying its own law is manifest.

B. Petitioner Could Adduce No Facts That Would Permit The Court To Find That It Is An Independent Corporate Entity And A Hearing Was Properly Denied.

Petitioner asserts that it was improperly denied an opportunity in the District Court to show that under Macanese law, the Macau branch should be treated as a separate juridical entity from BCCI Overseas. However, as correctly determined by the courts below, the factual issues the Petitioner sought to raise below, such as separate "capitalization," maintenance of separate books, and conformance with Macanese regulations, are irrelevant to the ultimate determination that the branches are part of a single corporate defendant.[4] *See Sokoloff v. National*

---

[3] Moreover, certain claimants who were not branch liquidators also asserted claims to the same accounts. It would be even more incongruous to apply the law of different jurisdictions to differing petitioners who assert rights to the same assets.

[4] Petitioner refers, somewhat misleadingly, to separate "capitalization." As Petitioner conceded at oral argument, the Macau

City Bank, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (1928), and *aff'd*, 164 N.E. 745 (N.Y. 1928); *First Nat'l Bank*, 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982).

Because Petitioner could present no set of facts that would entitle it to recover, the District Court properly dismissed Petitioner's claims without a hearing under 18 U.S.C. § 1963(*l*) and the Court of Appeals properly affirmed the District Court's order.

III. INTERNATIONAL COMITY SUPPORTS RECOGNITION OF THE COURT APPOINTED FIDUCIARIES AS CORPORATE REPRESENTATIVES, NOT THE PETITIONER.

The Petitioner claims that the courts below erred in not extending comity to the branch liquidation in Macau. But the question presented is not whether U.S. courts should accord comity, but rather *which* proceedings deserve comity: the global liquidation proceedings or the ring-fenced branch liquidations conducted to give preferential treatment to branch depositors over worldwide creditors. The Court Appointed Fiduciaries submit that comity requires deference to the global proceedings, which comport with U.S. policy.

---

branch has no shareholders and issued no stock. Consequently, it is not capitalized in the sense that this term is used in corporate law. Instead, it maintained reserves or capital equivalency deposits, consistent with local regulatory requirements, that supported the liquidity of the branch. In addition, while the Macau branch may have maintained an individual branch balance sheet for convenience, its assets and liabilities were reported to and consolidated into the balance sheets and books of BCCI Overseas as a corporate entity. Compliance with local regulatory requirements does not make a branch a separate corporation, any more than a domestic corporation's compliance with a state's sales and property tax requirements would make its division in that state a separate corporation.

This Court has defined comity as:

> the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895). In applying comity to foreign judgments, courts, including those cited by the Petitioner, make clear that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also DeYoung v. Beddome*, 707 F.Supp. 132, 135 (S.D.N.Y. 1989). The laws and public policy of the United States do not support a branch liquidator's goal to collect assets outside its ring-fenced jurisdiction for distribution on a preferential basis to the limited group of BCCI creditors who happen to be depositors of that branch. To the contrary, the laws and public policy of the United States support equal distribution of assets to *all* the creditors and depositors of a bank in dissolution, regardless of branch affiliation.

Since its enactment more than a century ago, for example, the National Bank Act ("NBA") has required equitable distribution of the assets of banks in dissolution. 12 U.S.C. §§ 91 & 194. In *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896), a savings bank sought the preferential return of funds in an account in a national bank in dissolution under a New York statute entitled "Debts Due Savings Banks from Insolvent Banks Preferred." *Id.* at 277. In addition to finding that the NBA preempted state law, this Court stated:

> [T]here is an absolute repugnancy between their provisions; that is, between the ratable distribution, commanded by congress, and the preferential distri-

> bution directed by the law of the state of New York. The conflict between the spirit and purpose of the two statutes is as pronounced as that which exists between their unambiguous letter. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors . . . .

Id. at 284; *see also United States ex rel. White v. Knox*, 111 U.S. 784, 786 (1884); *Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 759 (10th Cir. 1989) (NBA provisions for dissolution established a 'federal mandate of equality.') (citation omitted), *cert. denied*, 493 U.S. 1070 (1990); *Poole v. Elliott*, 76 F.2d 772, 774 (4th Cir. 1935) (All depositors from all branches, whether operated with or without legal authority, must be treated equally.). While the National Bank Act is not technically applicable to the liquidation of the BCCI Group, which was not a federally-chartered bank, the NBA and cases interpreting the NBA remain a strong statement of U.S. federal policy in favor of ratable distribution, which should apply with no less force in the context of an international liquidation.

The need for comity in favor of a single centralized proceeding in the country of incorporation is particularly strong in the context of international insolvency.

> The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.

Cunard S.S. Co. v. Salen Reefer Services AB, 773 F.2d 452, 458 (2d Cir. 1985). Comity toward foreign proceedings should be granted unless "contrary or prejudicial

to the interest of the nation called upon to give it effect." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (footnote omitted). Extension of comity in this case requires giving effect to the Plea Agreement, which was negotiated by the Court Appointed Fiduciaries and approved by the appointing courts in Luxembourg and the Cayman Islands.

In addition, the extension of comity to the liquidation proceedings in Luxembourg and Cayman Islands is appropriate because these countries have paramount interest in the liquidation of their domestic corporations. Only the global proceedings conducted by the Court Appointed Fiduciaries will assure "equitable, orderly, and systematic" distribution of assets. By contrast, turning over assets located in the United States to ring-fenced liquidations elsewhere would allow groups of creditors of particular branches, generally those that already have an advantage over the global body of similarly situated creditors, to obtain an even greater advantage over those worldwide creditors. Extension of comity to those proceedings would assure "haphazard, erratic or piecemeal" distribution. Such a result would be contrary to the principles of distribution set forth in the Bankruptcy Code, *see, e.g., In re Saybrook Mfg. Co.*, 963 F.2d 1490, 1496 (11th Cir. 1992), as well as national policy governing bank insolvencies expressed in the NBA.

CONCLUSION

For the above-stated reasons, the Court Appointed Fiduciaries respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

MICHAEL NUSSBAUM *
A. KATHERINE TOOMEY
NUSSBAUM & WALD
One Thomas Circle, Suite 200
Washington, D.C. 20005
(202) 833-8900

Counsel for Respondent Court Appointed Fiduciaries of BCCI

Dated: October 5, 1995

* Counsel of Record

APPENDICES

APPENDIX A

No. 007615/91

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice

Tuesday, 30th July, 1991

Before:

The Vice-Chancellor
(Sir Nicolas Browne-Wilkinson)

IN THE MATTER OF:

BANK OF CREDIT AND COMMERCE INTERNATIONAL, SA

JUDGMENT
(As Approved)

THE VICE-CHANCELLOR: This is a Winding Up Petition brought by the Bank of England under section 92 of the Banking Act, 1987, to wind up the Bank of Credit and Commerce International SA which I will refer to as "BCCI". BCCI is a Company incorporated in Luxembourg. There are many other Companies in the same group. The holding Company is also incorporated in Luxembourg. Another Company, BCCI Overseas, is incorporated in the Grand Cayman Islands. The holding Company also has numerous subsidiaries incorporated in various other jurisdictions around the World.

The Petition is based on two grounds, one, that it is in the public interest to wind up BCCI, the second, that BCCI is insolvent.

The evidence in support suggests that there has been very widespread fraud, also worldwide, in the running of BCCI in the past. It also suggests that the current position is that BCCI is substantially insolvent. It has depositors in many countries all round the world: it has assets in many countries all round the world. This Winding Up Petition is a Petition to wind up BCCI as a whole, not simply the United Kingdom branch of it. A Winding Up Petition could not be brought simply to wind up the English branches of BCCI.

When the matter was before me 8 days ago, an application was made by the Ruler of Abu Dhabi and the Abu Dhabi Government as majority shareholders in BCCI for an adjournment. I stood the matter over for 8 days for three matters to be considered. The first was that provisional liquidators appointed by this Court and a Commissaire appointed by the Courts in Luxembourg were encountering difficulties in obtaining information from Abu Dhabi. I wished to have that looked into.

The second point to be investigated was the position of the employees of BCCI in this country whose future during a prolonged adjournment would be very difficult. They would not be entitled to redundancy payments until a Winding Up Order was made, nor would the provisional liquidators necessarily be in a position to continue their employment.

The third matter to be considered was the position of sterling depositors in England. Under the Deposit Protection Scheme established by the Banking Act 1987, on the making of a Winding Up Order depositors would be entitled to receive payment of up to 75% of their loss to a maximum of £15,000. The effect of a prolonged adjournment of a Winding Up Petition would be that those

depositors would not be entitled to receive their compensation under the scheme. Those three matters seemed to me matters directly relevant to the question whether or not to grant the adjournment sought by the majority shareholders with a view to investigating the position and possibly putting forward a scheme for a partial or total rescue of BCCI could be worked out.

The matter now comes back before me and proposals have been put forward to deal with all three of those matters.

As to the first, namely, the availability of information to the Commissaire appointed by the Luxembourg Court and to the provisional liquidators, I am happy to say that that has been dealt with to the satisfaction of the provisional liquidators and the Commissaire.

As to the employees, a scheme has been worked out between the majority shareholders and the provisional liquidators along the following lines. On 31st of this month the majority shareholders will pay £1.2m to the provisional liquidators, being a sum estimated to provide sufficient to pay 14 days salaries and expenses for English employees.

Secondarily, every 7 days thereafter, it is the intention of the majority shareholders—though there is no binding obligation as I understand it—to pay such further sums to the provisional liquidators as are calculated to provide enough to cover salaries and expenses for a further 7 days. The provisional liquidators are to hold those monies paid to them on trust to pay salaries and expenses of the staff. In the event that the majority shareholders do not make any payment at the commencement of the 7 day period the provisional liquidator will apply to the Court, or dismiss some or all of the employees. However, the provisional liquidators will not dismiss any employee without giving 7 days notice of their intention so to do to the majority shareholders.

In the meantime, the majority shareholders and the provisional liquidators are to continue discussions concerning the formulation and implementation of a possible redundancy scheme. It his hoped, though no more, that such redundancy scheme will produce a sum equal to the statutory redundancy payments which would be obtained by employees dismissed in the event of winding up.

It is to be emphasised, as was emphasised to me in argument, that employees of BCCI in this country must appreciate that nothing that is being put forward at this stage provides them with any guarantee of the continuation of their jobs.

The third element relates to the position of those who have deposited money in England in Sterling. A scheme has been worked out in principle (though the detailed drafting of it remains to be completed) under which a Fund will be established. The majority shareholders have already remitted to this Country the sum of £50m of which £43m will be allocated to the Fund. The Fund is to be vested in the Law Debenture Trust Corporation PLC, and is to be administered by the provisional liquidators, or possibly only one of them, Mr. Morris. The Fund will be held on trust to make payments to UK Sterling Depositors on the same terms as they would be entitled under the Deposit Protection Scheme had a Winding Up order been made, but subject to the following alterations. Instead of a maximum payment of £15,000 under the Statutory Scheme, the maximum payment will be £5,000; payments out of the Fund will be by way of loan only. However, the majority shareholders and the Fund will not be entitled (subject to one exception) to recover from the receipients monies advanced by way of loan out of the Fund, save by recovery from the Deposit Protection Scheme (if a Winding Up Order is eventually made) or from BCCI (if negotiations for a rescue scheme prove successful). The majority shareholders will be ob-

taining from each depositor who receives an advance out of the Fund irrevocable mandates directed to the Deposit Protection Scheme and to BCCI, directing repayment either from the Scheme, or from the Fund. The sole exception proposed to the inability of the majority shareholders to recover the debt directly from the depositor is this: if a depositor has received an interim payment out of the Fund and seeks to revoke his irrevocable mandate, the majority shareholders would be entitled to recover the advance from the depositor direct.

Those proposals fall short of putting the United Kingdom Sterling depositors in exactly the same position as they would be if a Winding Up Order were made today. In particular, the limit of £5,000 as the maximum payment out of the Fund is plainly less beneficial than the maximum of £15,000 under the Statutory Scheme.

However, when I suggested this Scheme at the first hearing, my concern was directed, not so much to the putting in place the whole Statutory Scheme, but to ensuring that there would not be, so far as possible, suffering by the small depositor all of whose money had gone as a result of the unhappy position that has now arisen in relation to BCCI. The Scheme now proposed seems to me to achieve that result. Out of the 48,400 UK sterling depositors, 39,400 had deposits with BCCI of £2,000 or less. Those depositors will be better off under this proposal than under an immediate Winding Up Order, since they will receive exactly the same amount as they would under the Statutory Scheme, and in addition they have the chance—no more than the chance—of recovering the remaining 25% of their deposit which, if a Winding Up Order were to be made today, would look very dubious indeed. In addition to them, all those depositors with not more than £6,666-odd on deposit will also be in the same position as those to whom I have just referred. It is only those who have deposits in excess of the £6,666-odd who will be worse off under the

proposal than they would be if an immediate Winding Up Order were to be made.

In my judgment those proposals are adequate to cover short term suffering and are indeed, generous, since the money is put forward by the Government of Abu Dhabi in circumstances where they are under no legal obligation so to do in order to alleviate immediate suffering.

It was, therefore, rather to my surprise that I found the Bank of England opposing the application now made by the majority shareholders to adjourn this Hearing until 2nd December, to enable first the whole complicated situation within BCCI and its associates to be investigated and, secondly, having done that to see whether there can be put forward proposals for a partial or total restructuring and refinancing of BCCI.

The provisional liquidators, and in particular the Commissaire appointed by the Luxembourg Court, are in discussion with the majority shareholders. The provisional liquidators support the adjournment and consider a period of 4 months as an appropriate and necessary period in order for the research to take place.

The grounds of opposition by the Bank are stated in an Affidavit that has been sworn. The first ground is that the small depositors who would be entitled to 75% of their deposits up to £15,000 under the Statutory Scheme should get that full amount under the interim proposal being put forward by the majority shareholders. The Bank has not proved willing itself to contribute any cash towards that objective.

Secondly, it is said that BCCI is insolvent. That has not been proved though I am very far from saying it is untrue. But the very purpose of this adjournment is to lead to a position where the Court does not at this stage investigate the truth or falsity of the allegations made. The Bank feels that it is its responsibility to look after the position of the small depositors. It is said that the provision of less than the full maximum £15,000 casts doubts

over the willingness of the majority shareholders to make funds available for a rescue. It is said that the Bank is concerned, in a case where the most serious allegations of widespread fraud are made against the conduct of BCCI, that the Winding Up should proceed and that the necessary investigations should take place. Finally, it is said that there are no firm proposals put forward by the majority shareholders as to the terms on which any rescue could be affected.

Two small depositors also oppose the adjournment. It is not clear to me that they themselves are actually prejudiced by it, since I understood them to be depositors of under £2,000. But their position is the same as that put forward by The Bank of England, namely, they think they would do better, like other small depositors, if there were an immediate Winding Up.

I have no hesitation in rejecting The Bank of England's grounds for opposing an adjournment. This case raises, and will continue to raise, enormous problems. BCCI is a Luxembourg Bank; it is not an English Bank. As I understand it, if a Winding Up goes forward the assets of BCCI worldwide will be applicable for the creditors of BCCI worldwide. The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English Law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions. It is a matter of profound regret to me that there is no International Convention regulating international insolvency. This case, I hope, if it does nothing else may concentrate people's minds on the necessity for such a Convention. What we do have are some rather dated rules of Private International Law which will regulate the disposal of the assets in the event that no rescue scheme is possible. It will require the most difficult and complicated attempts at co-operation between the different national jurisdictions which I hope will be forthcoming. I am told that such co-operation is already

forthcoming from at least 3 other jurisdictions including Abu Dhabi itself with a view to co-ordinating what is an overwhelmingly difficult problem given the absence of any international structure to deal with it. But, whether the matter is dealt with by way of Winding Up or whether it is dealt with by schemes or arrangement, my present understanding is that all assets worldwide will have to be taken into account, as will all creditors. It is for that reason primarily that I am quite unable to accept The Bank of England's grounds for objecting to an adjournment in this case.

One aspect of their objection concentrates on the position of those creditors who are Sterling creditors of branches in this country who will, to the extent that I have tried to indicate, be worse off than if an immediate Winding Up Order were to be made. They number, at the most, some 9,000 creditors. The evidence before me states there are 1.25 million depositors of BCCI worldwide. It is the interests of the depositors as a whole which I believe this Court ought to consider. Though it can, and should, take into account particular classes of creditors, no class such as the Sterling depositor in this country can have the right to stand in the way of what otherwise might be in the interests of the creditors of BCCI as a whole. I am bound to say that this aspect of the case put forward by The Bank of England seems to be putting undue stress on the interest of English Sterling creditors at the expense of other creditors. The truth of the matter, as far as I can see, is that if any substantial recovery is to be made by the creditors of BCCI as a whole, worldwide, the best and possibly the only hope is the restructuring proposals which may be put forward by the Government of Abu Dhabi in the long run. To stand in the way of that possibility is not to serve the interests of the depositors of this Company viewed as a whole but to approach the matter on an insular basis.

I entirely accept the point made by The Bank that if the allegations made are true, BCCI has been conducted

in a way which is scandalously fraudulent and it would be in the public interest to put an end to it. Weighing that, and taking it into account, I am influenced by the fact that no question of further fraudulent dealing by the bank in this Country can occur in the interim. There are provisional liquidators in charge of the operation. The risk of perpetuation of that fraud in day to day dealings in the future is non-existent. Accordingly, though I can well understand the desire of the Bank of England to demonstrate that banks conducted in the way they allege BCCI has been conducted cannot survive, I do not believe that it is essential in the immediate interests either of the public or of the depositors that that should be demonstrated at this stage.

Finally, the ground that there is no concrete proposal put forward seems to me to carry no weight at all. Mr. Moss, for The Bank of England, accepted when it was put to him that the intervention of the world regulatory authorities on 5th July of this year completely altered the restructuring proposals that had been under discussion. In addition there are major, and possibly impossible, tasks of research to be done to try and disentangle what has happened in BCCI. The estimate of duration of such inquiries of 6 months does not seem to me to be in any way inordinate. It is necessary, as it seems to me, to provide sufficient time for that to be done.

I have considered the Bank's alternative proposals the first of which suggested there should be an adjournment only until October. However, I reject that because on the material before me (which includes the estimate made by the provisional liquidators and the Commissaire himself) that would be an inadequate period for useful progress to be made. Secondly, The Bank suggested that I should make a Winding Up Order, but suspend its operation pending the inquiries and possible negotiations taking place. That I have no hesitation in rejecting. I do not know, and cannot have any insight into, the reasons which are leading the majority shareholders to consider

a restructuring. They have said, and I am bound to accept it, that if a Winding Up Order is made they will have no further interest in seeking to rescue BCCI in any way. Since I do not know what their basic motivation is, I am quite unable to make an assessment as to whether they do or do not understand the full implications of a Winding Up Order with a Stay. I must accept what they say—if a Winding Up Order is made that is the end of any rescue at all. On that footing I reject any suggestion that I can make a Winding Up Order today since that will put an end to any hope of rescue.

For those reasons I propose to grant the adjournment until 2nd December. The documentation is not yet in place. I am assured that it is likely to be within the week. If the documentation is not in place within 7 days, I direct the provisional liquidators to apply back to me for further directions. In any event, I give liberty to restore the Winding Up Petition (on 14 days Notice) to The Bank of England as the Petitioner, to the provisional liquidators, to the majority shareholders and to BCCI itself. If any other creditor or person interested wishes to have the Winding Up Petition restored, they should apply to the provisional liquidators who will take the necessary steps to bring the matter to the Court's attention when it can be dealt with and considered.

Finally, I should say this. It is anticipated that the interim scheme for depositors will not take any longer to put in place and produce cash payments than would the Statutory Scheme if I had made a Winding Up Order. It is hoped, and nobody should attach more importance than is appropriate to the word "hoped", that payments will start in August.

Right, Mr. Moss, then I will stand it out until 2nd December. Anything else I ought to deal with today?

MR MOSS: My Lord, I do not believe so.

MR JOHNSON: My Lord, costs reserved, presumably?

THE VICE-CHANCELLOR: Costs reserved.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-0655

UNITED STATES OF AMERICA

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CRIMINAL TERM

Ind 8090/91

PEOPLE OF THE STATE OF NEW YORK

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *et al.*,

Defendants.

PLEA AGREEMENT

Parties and Purpose

WHEREAS, the United States of America, by its attorneys for the United States Department of Justice (the "DOJ"), the People of the State of New York, by the District Attorney for New York County, Robert M. Morgenthau (the "DANY") and Brian Smouha, Jacques Delvaux and Constant Franssens, as Commissairies of BCCI Holdings (Luxembourg) S.A. ("BCCI Holdings"); Brian Smouha, as Commissaire of Bank of Credit and Commerce International, S.A. ("BCCI SA"); Ian Wight and Robert Axford, as Joint Provisional Liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas"); and Ian Wight and Robert Axford as Joint Provisional Liquidators for International Credit and Investment Company (Overseas) Limited ("ICIC") (all such persons acting in the capacities so indicated or their duly appointed successors, being hereinafter collectively referred to herein as the "Court Appointed Fiduciaries"), have engaged in discussions with respect to the subject matter hereof pursuant to Rule 11 of the United States Federal Rules of Criminal Procedure, and, with respect to DANY, under New York law;

WHEREAS, the DOJ and the DANY have pursued investigations into the business and affairs of BCCI Holdings, BCCI SA, BCCI Overseas and ICIC (collectively, "BCCI"), which investigations have developed, for the benefit of law enforcement and regulatory agencies, significant evidence of criminal activity by the prior management of BCCI and both the DOJ and the DANY continue to pursue investigations into the impact of that activity;

WHEREAS, prior to July 5, 1991, BCCI had been a worldwide banking organization with operations in approximately 69 countries and on July 5, 1991 BCCI was closed by bank regulatory authorities in the United King-

dom, the United States, the Cayman Islands, Luxembourg and elsewhere;

WHEREAS, BCCI is presently insolvent, and is subject to insolvency or liquidation proceedings pursuant to the laws of Luxembourg and the Cayman Islands and, in the case of certain agencies and branches of BCCI SA, are awaiting liquidation or in the process of being liquidated in the States of California and New York, and elsewhere;

WHEREAS, the failure of BCCI is likely to cause thousands of innocent depositors and other creditors throughout the world to suffer losses in the aggregate in billions of dollars;

WHEREAS, in order to address the foregoing, the Court Appointed Fiduciaries have been appointed to act as joint provisional liquidators and/or commissaires by courts in the respective domiciles of the BCCI companies to collect all BCCI assets located throughout the world, and liquidate the same for the purpose of achieving the greatest possible distribution to all lawful creditors and depositors of BCCI on a worldwide basis;

WHEREAS, in furtherance of the Court Appointed Fiduciaries' efforts, the Court Appointed Fiduciaries have filed a petition in Bankruptcy Court in the Southern District of New York under Title 11, Section 304 of the Bankruptcy Code seeking the turnover of all BCCI assets in the United States to the Court Appointed Fiduciaries (the "Section 304 Proceeding") and a Temporary Restraining Order has been issued in connection therewith;

WHEREAS, former management and operators of BCCI fraudulently and secretly acquired (1) direct or indirect ownership and control over the shares of First American Bankshares Inc., Washington, D.C. ("First American"), the former National Bank of Georgia, Atlanta, Georgia, and Independence Bank, Encino, Cali-

fornia ("Independence Bank"), and (2) an interest in the former CenTrust Savings Bank, Miami, Florida ("CenTrust");

WHEREAS, the DOJ and federal banking regulators intend to minimize the risk of potential loss to the Bank Insurance Fund and United States taxpayers by obtaining a fund which could provide additional capital to depository institutions and safeguard the Bank Insurance Fund, if either are necessary, in connection with BCCI's secret investment in U.S. financial institutions;

WHEREAS, it appears that the identifiable assets of BCCI in the United States, exclusive of any stock ownership in First American and Independence Bank, constitute approximately $550,000,000 in cash and other assets;

WHEREAS, the prior management and operators of BCCI are no longer involved in any effective decision-making capacity with BCCI, and its worldwide affairs are subject to the control of the Court Appointed Fiduciaries whom the DOJ, the DANY and the other parties hereto recognize, based upon various court appointments, as having full right and authority to act on behalf of BCCI and whom the DOJ and the DANY are willing to support in their efforts to collect and appropriately liquidate and distribute the assets of BCCI in an orderly and fair manner, consistent with the protection of innocent victims of BCCI and the due administration of justice;

WHEREAS, responsible authorities in the United States, the United Kingdom, the Cayman Islands and Luxembourg desire that the assets of BCCI be distributed by the Court Appointed Fiduciaries only in a manner which (a) protects United States taxpayers from potential losses to the banking organizations illegally acquired by BCCI, (b) provides prompt recovery to innocent depositors, creditors and other victims of BCCI, and (c) ensures, as set forth herein, that no monies are paid to persons who have violated laws forbidding narcotics

trafficking, terrorism, money laundering, crimes of violence or other acts generally recognized as felonies or similar crimes under the laws of the United States and other countries subscribing to recognized norms of international justice;

WHEREAS, pleas of guilty entered by the Court Appointed Fiduciaries, on behalf of BCCI, to substantial criminal charges in the United States will address significant U.S. law enforcement interests that the parties hereto believe, once the pleas provided for herein are entered and accepted by the relevant courts and all of the provisions of this Agreement are implemented as provided herein, will resolve all criminal investigations, charges, indictments and all criminal and civil proceedings against BCCI concerning matters occurring before July 5, 1991 subject to the terms and conditions set forth herein, thereby removing a major impediment and in fact facilitating the distribution of substantial BCCI assets to innocent depositors, creditors and other victims of BCCI;

WHEREAS, in addition to the DOJ and the DANY, responsible international law enforcement and regulatory authorities in the United Kingdom, the Cayman Islands and Luxembourg also desire a resolution which balances interests in obtaining an appropriate penalty for illegal corporate conduct and compensation of innocent depositors, creditors and other victims of BCCI;

WHEREAS, the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges in the United States District Court for the District of Columbia (the "U.S. District Court") and the Supreme Court of the State of New York (the "N.Y. Supreme Court") as provided herein is not intended by the parties hereto to preclude the criminal prosecution of or any civil action against any culpable BCCI officers, employees, agents or other entities (other than BCCI) or wrongdoers;

WHEREAS, the parties believe that the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges as provided herein will materially assist in the prosecution of culpable persons and entities (other than BCCI) by permitting DOJ, DANY, and other enforcement authorities to obtain greater access to documents and witnesses through the full cooperation and assistance of the Court Appointed Fiduciaries.

NOW, THEREFORE, the United States of America through the DOJ, the DANY, the Board of Governors of the Federal Reserve System (the "Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Resolution Trust Corporation (the "RTC"), the Office of Thrift Supervision (the "OTS"), the Office of the Comptroller of the Currency (the "OCC"), the Securities and Exchange Commission ("SEC") the Superintendent of Banks of the State of New York ("N.Y. Banking"), the Superintendent of Banks of the State of California ("California Banking") and the Court Appointed Fiduciaries, with the assistance and support of the Serious Fraud Office of the United Kingdom (the "Serious Fraud Office"), the Public Prosecutor for Luxembourg, and the Attorney General of the Cayman Islands hereby covenant and agree as follows:

THE PLEAS

The Federal Plea

1. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to waive venue and plead guilty in the U.S. District Court to the information, attached hereto as Exhibit A-1 (the "U.S. Information"), which charges BCCI with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. Sections 1962(c) and (d).

2. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the U.S. Information.

3. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the charges contained in the U.S. Information and, in causing BCCI to plead guilty to the U.S. Information, the Court Appointed Fiduciaries, on behalf of BCCI, will accept the factual statements set forth in the U.S. Information and the conclusion of the DOJ that these statements provide a legally sufficient factual basis for the plea contemplated in paragraph 1 above.

The New York County Plea

4. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to plead guilty in the N.Y. Supreme Court to counts one through six of New York County Indictment Number 8090/91 ("N.Y. Indictment") (Attached hereto as Exhibit A-2), it being expressly understood that the DANY will move to withdraw, as to BCCI only, at the time of the plea of guilty the second full paragraph of page 5 of said indictment, and the Court Appointed Fiduciaries will consent to that motion.

5. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the N.Y. Indictment.

6. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the crimes charged in counts one through six of the N.Y. Indictment as amended pursuant to paragraph 4 and, in causing BCCI to plead guilty to those crimes,

the Court Appointed Fiduciaries, on behalf of BCCI, accept that the factual statements set forth in counts one through six of the N.Y. Indictment provide a legally sufficient factual basis for the plea contemplated in paragraph 4 above.

7. The Court Appointed Fiduciaries, on behalf of BCCI, will join with the DANY's recommendation that, a fine of $10,000,000 under the New York Penal Law section 80.15 be imposed, jointly and severally, on the corporate entities defined above as BCCI, payable as provided in paragraph 12 below.

FORFEITURE AND DISGORGEMENT

8.(a) Upon execution of this Agreement by the parties, the Court Appointed Fiduciaries will cause $5,000,000 to be paid as an interim capitalization payment to Independence Bank (the "Interim Capitalization Payment") in exchange for newly issued shares of Independence Bank, which shares shall represent all the outstanding shares of Independence Bank. The shares to be issued pursuant to the Interim Capitalization Payment shall be issued in the name of one or more of the entities constituting BCCI herein and shall be subject to the divestiture Order of the Board of Governors of May 6, 1991 and placed in a trust to manage, control and sell Independence Bank, with an independent trustee to be selected by the Court Appointed Fiduciaries, which trust and trustee will be subject to the approval of the Board of Governors, California Banking, DOJ, and DANY, and subject to paragraph 9(b).

(b) Upon the filing of the U.S. Information, pursuant to 18 U.S.C. Section 1963(d)(1), the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for an order directing that certain BCCI assets located in the United States, more fully described in Exhibit B, be paid

into a custodial account maintained by the Treasury Department in a segregated account within the Department of Justice Seized Asset Deposit Fund in the name of the U.S. District Court (the "Custodial Account"). As proceeds from paragraphs 9(b) through (e) becomes available, the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for appropriate orders effectuating the transfer of proceeds to the Custodial Account for disbursement. During the term of this Agreement, funds in the Custodial Account shall draw interest, which interest will accrue to the Custodial Account. Upon entry of the Forfeiture Order as provided herein, the Custodial Account will be transferred from the Seized Asset Deposit Fund to the Department of Justice Assets Forfeiture Fund. Notice of any payments and transfers relating to the Custodial Account shall be made to the parties by the Treasury Department.

9. Upon entry of a judgment of conviction on the U.S. Information and an order of forfeiture issued pursuant to 18 U.S.C. Sections 1963(a)(1), (2) and (3) (the "Forfeiture Order"), BCCI shall forfeit to the United States the following property of BCCI located in the United States:

(a) all of BCCI's ownership interest in deposits and other assets originally held in those banks and brokerage firms identified on Exhibit B hereto and then paid into the Custodial Account under paragraph 8(b),

(b) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in Independence Bank, but not the stock, security or other interest itself,

(c) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in First American, but not the stock, security or other interest itself,

(d) the balance of the liquidation estates of the Los Angeles and New York agencies of BCCI SA, but not the estates themselves, upon completion of liquidation proceedings conducted by the New York Banking and the California Banking in accordance with the laws of California and New York. For purposes of the foregoing, the "liquidation estates" shall consist of all of the rights and interests of the Superintendent of Banks of the states of New York and California under their respective state law banking statutes, with respect to the assets of BCCI SA located in their respective states and the assets of the New York and California agencies of BCCI SA. The liquidation estates do not include the assets enumerated in Exhibit B, and

(e) the entirety of BCCI's interests in all other property, not identified in clauses 9(a) through (d), located in the United States, including, without limitation, real property and all tangible and intangible personal property.

10. In furtherance of the ongoing liquidation activities of the New York Banking and the California Banking, the New York Banking and the California Banking will attempt to complete their respective liquidations as soon as practicable consistent with their respective statutes and the determinations of their respective courts. Thereafter, they will transfer to the Custodial Account the United States' forfeiture interest in the entire remainder of the liquidation estates, as quickly as reasonably possible.

11. As promptly as practicable after the entry of the Forfeiture Order and, to the extent possible, pending the completion of any proceedings that may be required under 18 U.S.C. Section 1963(*l*), disbursements shall be made from the Custodial Account to a U.S. Disgorgement, Compensation and Penalty Fund maintained by the Treasury Department within the Department of Justice Assets Forfeiture Fund (the "U.S. Fund") and, subject to para-

graphs 13, 14, and 17 below, to a Worldwide Victims and Creditors Compensation Fund maintained by the Court Appointed Fiduciaries (the "Worldwide Victims Fund") as follows:

(a) subject to clause (d) below, the first $100,000,000 deposited in the Custodial Account shall be disbursed to the U.S. Fund for the purposes set forth in paragraph 12;

(b) the next $100,000,000 deposited in the Custodial Account shall be disbursed to the Worldwide Victims Fund;

(c) subsequent deposits to the Custodial Account shall be concurrently disbursed in equal amounts to the U.S. Fund and the Worldwide Victims Fund, except that monies due to the U.S. Fund shall be paid without regard to delays, if any, under paragraph 13(a);

(d) prior to the disbursement described in clauses (a) through (c) of this paragraph 11, the Interim Capitalization Payment described in paragraph 8(a) shall be refunded to the Court Appointed Fiduciaries.

12. As determined in the sole discretion of the Attorney General of the United States (the "Attorney General"), the U.S. Fund shall be used for the following purposes:

(a) to minimize the risk of potential loss to the Bank Insurance Fund of the FDIC and United States taxpayers by providing additional capital, upon the request of the FDIC, OCC and the Board of Governors, to the subsidiary banks of First American, and Independence Bank, or to reimburse the Bank Insurance Fund for any losses it incurs in connection with the sale or disposition of these institutions; *provided, however,* that when all said institutions are sold or otherwise disposed of an amount equal to any such capital infusion or insurance fund payment

shall first be repaid to the U.S. Fund, with the balance of the net proceeds of the sale or disposition paid in equal amounts through the Custodial Account to the U.S. Fund and the Worldwide Victims Fund;

(b) within one week of the entry of the Order of Forfeiture, the Court Appointed Fiduciaries shall apply for remission, and the Attorney General will remit as soon as available $10,000,000 out of funds deposited in the U.S. Fund pursuant to paragraph 11(c) above for the sole purpose of paying the fine imposed or to be imposed upon BCCI in the N.Y. Supreme Court pursuant to paragraph 7 of this Agreement; it being understood and agreed that the distribution set forth under this paragraph shall take precedence over all other distributions from the U.S. Fund, obtained under paragraph 11(c), unless there is written consent otherwise of both the Attorney General and the DANY;

(c) to satisfy a punitive forfeiture in an amount to be determined in the sole and absolute discretion of the Attorney General;

(d) to compensate the DOJ for the reasonable costs of investigation and prosecution of BCCI and any former employees, officers or agents of BCCI, or other individuals who assisted its criminal activities;

(e) to compensate the DANY for the reasonable costs of its investigation and prosecution of BCCI and continued investigation of the activities of former employees, officers or agents of BCCI, should DANY make an application for equitable sharing;

(f) for restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries in accordance with 18 U.S.C. Section 1963(g) for the purpose of facilitating an increase in assets avail-

able for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI, and which may include claims related to the failure of CenTrust, if any;

(g) to reimburse the Board of Governors, FDIC, RTC, OTS, OCC, SEC for the reasonable costs of their investigations of, and civil and administrative proceedings against BCCI and related persons and entities.

(h) to take other appropriate measures as authorized pursuant to 18 U.S.C. Sections 1963(f) and (g).

The DOJ will notify DANY of disbursements from the U.S. Fund.

13. Disbursements to the Worldwide Victims Fund are conditioned on availability of funds under paragraph 11, establishment of a screening mechanism under paragraph 14, and, as provided in clause (a) below, the cooperation requirements of paragraphs 17 and clauses 21(c) and (e). The amounts payable to the Worldwide Victims Fund shall be paid every 15 days beginning as soon as practicable after entry of the Forfeiture Order in increments of $50,000,000 (or such lesser amounts as are available) until all funds are paid unless:

(a) DOJ or DANY have filed written notice with the Court Appointed Fiduciaries specifying the details of a violation of or a failure to comply with paragraph 17, or in the case of an alleged violation of or failure to comply with clauses (c) and (e) of paragraph 21, upon similar written notice filed by the DOJ with the Court Appointed Fiduciaries, in which case payments will be deferred until the parties resolve any dispute over such cooperation. Any dispute not resolved by the parties within 10 days of such notification may be referred by any party to the District Court for resolution. Upon resolution

of any objection under this section, transfers will resume promptly as provided above.

(b) During the pendency of any delay by virtue of objections under clause (a) above, interest which accrues on these funds held in the Custodial Account shall accrue to the benefit of the Worldwide Victims Fund and shall be payable at the same time as and together with the principal to which it relates.

14. Prior to the transfer of funds to the Worldwide Victims Fund pursuant to paragraph 13, the Court Appointed Fiduciaries shall have established an international screening mechanism acceptable to the DOJ and DANY that assures, consistent with the laws of the countries governing the distribution of the Worldwide Victims Fund by the Court Appointed Fiduciaries, that such funds will be distributed only to innocent depositors, creditors and other victims of BCCI whose claims are not derived directly or indirectly through violations of United States or other laws concerning narcotics, terrorism, money laundering, crimes of violence, or other acts generally recognized as felonies or similar crimes under the laws of countries subscribing to recognized norms of international justice. The screening mechanism shall, where appropriate, incorporate participation of the Bank of England, the Serious Fraud Office, the Public Prosecutor of Luxembourg, and the Attorney General of the Cayman Islands and the assistance of the United States Federal Bureau of Investigation and the DANY.

15. In the unlikely event that funds in the Worldwide Victims Fund and funds otherwise available to the Court Appointed Fiduciaries exceed the amount required for full compensation of the innocent depositors, creditors and other victims of BCCI described in paragraphs 14 above, the excess funds will be returned to the United States for deposit into the U.S. Fund and distribution as contemplated in paragraph 12 above.

MISCELLANEOUS PROVISIONS

16. The parties hereto agree to assist each other in effectuating the Forfeiture Order and taking whatever action may be reasonably necessary to protect the interests of the parties hereto in the property ordered forfeited, including, without limitation, identifying and collecting BCCI assets and causing the transfer thereof to the Custodial Account, promptly addressing claims and objections to the Forfeiture Oder filed by third parties pursuant to 18 U.S.C. Sections 1963(g) and/or 1963(*l*) and, subject to the terms of this Agreement, transferring funds to the U.S. Fund and the Worldwide Victims Fund as provided herein.

17.(a) The Court Appointed Fiduciaries agree to cooperate fully with the DOJ and the DANY in their ongoing investigations and related proceedings concerning BCCI and BCCI related activities, individuals and entities, to the fullest extent allowed under applicable United States and foreign law.

(b) As used in this paragraph:

(i) "investigative information" includes documents, records, tangible evidence or other information concerning BCCI and related activities, individuals and entities requested by DOJ or DANY.

(ii) "production" of investigative information means to obtain access to, provide originals of where practicable, make and provide copies of, and permit use of such information, as specified by the requesting party.

(c) In the event that the Court Appointed Fiduciaries conclude that production of investigative information violates a relevant and applicable foreign law, the Court Appointed Fiduciaries will promptly:

(i) notify the requesting party detailing the legal prohibition or limitation to production, access, copying or other use of said information;

(ii) comply, in as complete a form as possible, with the request, in a manner that does not result in a violation of the asserted foreign law inhibition; and

(iii) take such reasonable steps, including seeking appropriate waivers from appropriate persons and entities, and making applications or joining in applications made by the requesting party, at the discretion of the requesting party, to appropriate courts or other bodies to attempt to meet the foreign legal requisites necessary to permit compliance or overcome the foreign legal barriers inhibiting compliance.

(d) Cooperation hereunder includes, but is not limited to the following, consistent with clauses (a), (c), and (e) through (g) herein:

(i) The Court Appointed Fiduciaries agree to produce to the DOJ and the DANY any investigative information that is subject to the control of the Court Appointed Fiduciaries.

(ii) The Court Appointed Fiduciaries agree to use their good offices, when requested by either the DOJ or the DANY, to facilitate production of investigative information in the custody or control of third parties.

(iii) At the request of the DOJ or the DANY, the Court Appointed Fiduciaries will direct any employee or other person subject to their control to testify in any duly convened grand jury, court, or other criminal, investigative, or administrative proceeding, and will, in addition, use their good offices and, at the expense of the

DOJ, all reasonable efforts to persuade former employees, clients, and shareholders of BCCI, and others to cooperate with the requesting party and to testify in any such proceeding.

(iv) The Court Appointed Fiduciaries agree to waive any privileges, including the attorney-client, accountant-client, and work product privileges, with respect to any investigative information existing as of July 5, 1991.

(v) The Court Appointed Fiduciaries further agree to provide investigative information created after July 5, 1991 to the DOJ and the DANY relating to the tracing and locating of assets that flowed from or to BCCI and BCCI related entities and persons as a result of criminal activity.

(e) With respect to investigative information created after July 5, 1991, it is not the intent of this Agreement to require the Court Appointed Fiduciaries to waive the attorney client privilege in connection with documents or communications reflecting or containing legal advice to the Court Appointed Fiduciaries or attorney work product related thereto or otherwise pertaining to the subject matter of their appointments.

(f) Where investigative information is requested that:

(i) was created after July 5, 1991.

(ii) was created for the purpose of negotiating settlement of specific creditor or depositor claims, and

(iii) would, in the opinion of the Court Appointed Fiduciaries, pose a substantial risk of jeopardizing the specific negotiations or materially interfere with the lawful performance

of their fiduciary obligations, the Court Appointed Fiduciaries will so inform the requesting party and provide the requesting party an estimate of how long the perceived inhibition to disclosure would persist, and will pursue, if requested by the requesting party, efforts, including resort to an appropriate judicial body, to permit the disclosure of the requested information under circumstances that will preserve confidential and secure treatment of the information and avoid the risk of interference noted above.

(g) The DOJ agrees to assume the reasonable costs of obtaining production of the foregoing for the DOJ and the DANY, upon advance notice of the approximate cost and a statement of the reasons why such production is necessary.

18. As part of the sentence imposed in connection with the entry of the pleas contemplated in paragraphs 1 and 4 above, the Court Appointed Fiduciaries agree that BCCI shall be barred from doing business within the United States except upon written notice to the DOJ and the express written permission of the appropriate Department or Agency of the United States, and with respect to doing business within the State of New York, except upon the further written notice to the DANY and the express written permission of the New York Banking, and with respect to business in the State of California, except upon the express written permission of California Banking. This provision is not intended to limit the activities of the Court Appointed Fiduciaries, pursuant to their respective court or other appointments, within the United States, in connection with the liquidation of BCCI. Additionally, before any person, other than the Court Appointed Fiduciaries, is appointed to act in a trustee or fiduciary capacity affecting assets located in the State of New York, the approval of the DANY and

the New York Banking shall be obtained, and with respect to assets in California, the approval of California Banking shall be obtained.

19. The Court Appointed Fiduciaries will obtain, with the assistance of DOJ and DANY where appropriate, all regulatory, judicial, administrative or other filings, notices, applications, consents, orders or approvals required to be obtained in order for the Court Appointed Fiduciaries, on behalf of BCCI, to satisfy fully their obligations under this Agreement, including seeking any necessary modification of the Temporary Restraining Order, the Court Appointed Fiduciaries' request for a preliminary injunction in the Section 304 Proceeding and/or the Consent Order entered in connection with the 304 Proceeding on October 16, 1991.

20. The Court Appointed Fiduciaries agree to:

(a) consent to the assessment in the amount claimed in the civil monetary penalty action brought by the Board of Governors against BCCI on July 29, 1991; and

(b) comply with the Divestiture Orders issued by the Board of Governors on March 4, 1991 and May 6, 1991 (the "Board Orders").

The Board of Governors agrees to stay and not seek execution of that assessment against any property forfeited under this Agreement or located outside the United States and to not file any claim for this assessment in the New York or California BCCI SA liquidations or in any liquidation proceeding involving BCCI in Luxembourg, the Cayman Islands or elsewhere.

21. Subject to paragraph 20, the Board of Governors, FDIC, RTC, OTS, OCC and the New York and California Banking agree to forego additional civil monetary penalty and other similar damage actions wherein they seek funds from or make claims against the Worldwide Victims Fund, the liquidation estates in the New York

and California liquidation proceedings for BCCI SA, and foreign assets and liquidation estates of BCCI, except as follows:

(a) The FDIC, RTC, OTS, OCC and New York and California Banking specifically reserve their ability, as conservators, liquidators and receivers, and potential conservators, liquidators and receivers, to file compensatory claims in the foreign liquidation process, in accordance with the appropriate foreign law. Provided, however, that if Independence Bank and First American are sold or otherwise disposed of without loss to the Bank Insurance Fund, the FDIC will not file any such claim.

(b) Further, the FDIC, RTC, OTS, OCC, New York Banking and California Banking further reserve their ability on behalf of U.S. financial institutions acting as such or in their corporate capacity, or acting as a conservator, liquidator or receiver to pursue civil contract claims.

(c) Additionally, the Board of Governors and joint issuers of the Board of Governors Orders may enforce the Board's Orders or subsequent orders issued by them in connection with the required divestiture of BCCI's interests in First American or Independence Bank.

(d) The SEC agrees to forgo any enforcement action against BCCI related to the acquisition and sale of stock and other securities in connection with the financial institutions described in the U.S. Information.

(e) The Court Appointed Fiduciaries also agree to cooperate with the Board of Governors, FDIC, RTC, OTS, OCC, and SEC in their investigations of BCCI-related wrongdoing, and in related proceedings, in the manner described in paragraph 17 above.

(f) The Court Appointed Fiduciaries release any and all claims which they may have against the Board of Governors, FDIC, RTC, OTS, OCC, SEC, New York

Banking and California Banking for actions taken in their respective regulatory capacities.

(g) Nothing in this Agreement bars New York Banking or California Banking from recovering their administrative expenses from their respective liquidation proceedings, in accordance with their respective state laws.

22. The United States and the DANY agree that, should the U.S. District Court and the N.Y. Supreme Court accept the pleas contemplated in paragraphs 1 and 4 above, and should the U.S. District Court enter the Forfeiture Order all pending criminal charges heretofore brought against BCCI by either of them shall be concluded and neither will bring any additional criminal charges against BCCI for matters occurring before July 5, 1991.

23. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties agree that the specific sentence, including the Forfeiture Order, set forth in this Agreement provides the appropriate disposition of this case and that the parties will ask the Court to enter a Judgment of Conviction and issue a Forfeiture Order consistent with this Agreement within 10 days of the entry of the pleas in this case, considering that time is of the essence (or such other date as the U.S. District Court may set). If the U.S. District Court accepts the agreed sentence including the forfeiture as set forth above, the Court Appointed Fiduciaries, on behalf of BCCI, may not withdraw the plea contemplated in paragraph 1 above as a matter of right under Federal Rule of Criminal Procedure 11(e)(2) and (4). The Court Appointed Fiduciaries, on behalf of BCCI, understand that the Forfeiture Order of the U.S. District Court is enforceable both as a part of the sentence and in the same manner as a civil judgment. Should the judge refuse to accept the forfeiture aspect of the sentence, this Agreement shall become null and void and no party will be bound hereto.

24. The Court Appointed Fiduciaries and their attorneys acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to induce the Court Appointed Fiduciaries to enter a plea of guilty on behalf of BCCI. The Court Appointed Fiduciaries understand that failure to abide by any term of the Agreement is a violation of the Agreement and may render it null and void or result in such sanction as may be determined by the U.S. District Court or N.Y. Supreme Court. The Court Appointed Fiduciaries further agree this Agreement shall be filed and become a part of the record in the U.S. District Court and the N.Y. Supreme Court.

25. The parties hereto understand and agree that all of the agreements contained herein shall be conditional on each such agreement and if, for any reason, the U.S. District Court, the N.Y. Supreme Court, or any other United States court of competent jurisdiction shall find any provision of this Agreement to be unenforceable, this Agreement may become null and void, at the option of either the DOJ, DANY and Court Appointed Fiduciaries, and no party hereto will be bound hereto.

26. This Agreement may be executed in one or more identical counterparts, whether transmitted by telecopier or otherwise. Each such counterpart shall be deemed to be an original for purposes of this Agreement.

27. This Agreement sets forth the entire understanding of the parties hereto with respect to the subject matter hereof. Except as explicitly set forth in this Agreement, there are no representations, warranties, or inducements —oral, written, expressed or implied—that in any way affect the validity of this Agreement or any of its terms. All prior negotiations, oral and written, are merged in this Agreement. Evidence of such negotiations, including prior drafts, shall not be admissible for any purpose in any proceeding related to this Agreement or its performance. Any amendments shall be with the mutual, written consent of the parties.

28. This Agreement shall be governed by and construed in accordance with the laws of the United States of America, except with respect to the matters contemplated in paragraph 4 through 7 hereof which, only to the extent necessary, shall be construed in accordance with applicable New York law.

29. The Court Appointed Fiduciaries agree to a tolling of any applicable statute of limitations as to criminal matters related to BCCI during the term of this Agreement and for 90 days thereafter.

WAIVER OF TRIAL RIGHTS

30. The Court Appointed Fiduciaries have read the charges against BCCI contained in the U.S. Information and the N.Y. Indictment, and those charges have been fully explained to them by their attorneys.

31. The Court Appointed Fiduciaries understand that in accordance with federal law, 18 U.S.C. Section 3013, upon entry of judgment of conviction, BCCI will be assessed $50 for each count, in addition to any other penalty imposed pursuant to this Agreement. Similarly, the Court Appointed Fiduciaries understand that in accordance with New York law, Penal Law Section 60.35, each of the pleading corporate entities upon entry of judgment of conviction, will be assessed a $100 mandatory surcharge and a $2 crime victim assistance fee, in addition to any other penalty imposed.

32. The Court Appointed Fiduciaries understand that by entering a guilty plea on behalf of BCCI, they surrender certain rights under federal and New York State law, including the following:

(a) If BCCI persisted in a plea of not guilty to the charges against it, BCCI would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. BCCI has a right to a jury trial. However, in

order that the trial be conducted by the judge sitting without a jury, BCCI, under New York law, and BCCI, the government and the judge, under federal law, all must agree that the trial be conducted by the judge without a jury.

(b) In the federal and New York prosecutions, if the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. BCCI and its attorney would have an opportunity to seek the removal of prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The respective juries would have to agree unanimously before it could return a verdict of either guilty or not guilty, as to each count of the U.S. Information and the N.Y. Indictment. The respective juries would be instructed that BCCI is presumed innocent, and that it could not convict BCCI unless, after hearing all the evidence, it was persuaded of BCCI's guilt beyond a reasonable doubt, and that it was to consider each count of the U.S. Information and the N.Y. Indictment separately.

(c) If BCCI and the government waive the right to a jury trial, the appropriate court after hearing all the evidence, and considering each count separately, would determine whether or not it was persuaded of BCCI's guilt beyond a reasonable doubt in connection with the U.S. Information and the N.Y. Indictment.

(d) At a federal and New York state trial, whether by a jury or a judge, the prosecution would be required to present its witnesses and other evidence against BCCI. BCCI would be able to confront those prosecution witnesses and its attorney would be able to cross-examine them. In turn, although it would not be obligated to do so, BCCI could require the attendance of its witnesses within

the territorial jurisdiction of the United States through the subpoena power of the court, or in connection with the N.Y. Indictment, as provided under New York law.

(e) BCCI would have the right to have the charges outlined in the U.S. Information brought by indictment upon the concurrence of not less than 12 members of a grand jury, comprised of at least 16 and not more than 23 persons, that there is probable cause for the charges.

(f) Should the plea to the U.S. Information occur prior to entry of the guilty plea to the New York Indictment, the Court Appointed Fiduciaries waive any defense to the N.Y. Indictment based upon the New York State Double Jeopardy law in order to permit the guilty plea to the New York State Indictment to be entered as provided herein.

33. The Court Appointed Fiduciaries, on behalf of BCCI, understand that by entering a plea of guilty as provided herein, the Court Appointed Fiduciaries, on behalf of BCCI, are waiving all the rights set forth in the prior paragraph. The Court Appointed Fiduciaries' attorneys have explained those rights to the Court Appointed Fiduciaries, and the consequences of the waiver of those rights as contemplated herein. The Court Appointed Fiduciaries understand that they are waiving all appellate issues that might have been available if they had exercised its right to trial.

34. Upon imposition of the sentence contemplated herein, the DOJ will move to dismiss the remaining charges against BCCI currently pending in any U.S. District Court.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of December 19th, 1991.

Agreed by United States, and the People of the State of New York:

By:

Department of Justice

Through:

William P. Barr
Attorney General

By /s/ George J. Terwilliger
GEORGE J. TERWILLIGER
Acting Deputy Attorney General

By /s/ Robert S. Mueller III
ROBERT S. MUELLER III
Assistant Attorney General
Criminal Division

By /s/ [Illegible] Acting
SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

By /s/ Stuart M. Gerson
STUART M. GERSON
Assistant Attorney General
Civil Division

And the following
United States Attorneys:

/s/ J.B. Stephens
JAY B. STEPHENS
District of Columbia

/s/ Robert W. Genzman
ROBERT W. GENZMAN
M.D. Florida

OTTO G. OBERMAIER
S.D. New York

People of the State of
New York

By:

/s/ Robert M. Morgenthau
ROBERT M. MORGENTHAU
District Attorney
New York County

/s/ Joe D. Whitley
JOE D. WHITLEY
N.D. Georgia

/s/ Lourdes G. Baird
LOURDES G. BAIRD
C.D. California

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
S.D. Florida

Agreed by Court Appointed Fiduciaries

By:

But in the name and on behalf of the company by authority of the court and without personal liability

/s/ JD, CF, BAS

COMMISSAIRES OF BCCI HOLDINGS (LUXEMBOURG) S.A., not in their individual capacities

/s/ Brian Smouha
BRIAN SMOUHA

/s/ Jacques Delvaux
JACQUES DELVAUX

/s/ Constant Franssone
CONSTANT FRANSSONE

COMMISSAIRE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., not in his individual capacity

/s/ Brian Smouha
BRIAN SMOUHA

JOINT PROVISIONAL LIQUIDATORS OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD., and INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD., not in their individual capacities

/s/ Ian Wight
IAN WIGHT

ROBERT AXFORD

Agreed by U.S. Regulators:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

By: /s/ William W. Wiles
WILLIAM W. WILES
Secretary

FEDERAL DEPOSIT INSURANCE CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

RESOLUTION TRUST CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

OFFICE OF THE COMPTROLLER OF THE CURRENCY

By: /s/ Robert L. Clarke
ROBERT L. CLARKE
Comptroller of the Currency

OFFICE OF THRIFT SUPERVISION

By: /s/ Timothy Ryan
TIMOTHY RYAN
Director

SECURITIES AND EXCHANGE COMMISSION

By: /s/ Richard C. Breeden
RICHARD C. BREEDEN
Chairman

Agreed by New York State Regulators:

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, in his capacity as Liquidator of the New York Agency of Bank of Credit & Commerce International, S.A.

By: /s/ Derrick D. Cephas
Name:
Title:

By:
JAMES E. GILLERAN

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Chedit and Commerce International, S.A.

Agreed by California State Regulators:

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

/s/ James E. Gilleran
JAMES E. GILLERAN
Superintendent

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 91-0655

Washington, D.C.
January 24, 1992
10:00 a.m.

UNITED STATES OF AMERICA

vs.

#1—BCCI HOLDINGS (LUXEMBOURG), S.A.,

#2—BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.,

#3—BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED,

#4—INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants

TRANSCRIPT OF PLEA ACCEPTANCE
AND SENTENCE BEFORE THE
HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

---

[2]

PROCEEDINGS

THE DEPUTY CLERK: Criminal Action 91-655, United States of America versus BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International

(Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. Mr. Raphaelson, Mr. Carver, Mr. Cassella, Mr. Dubester for the Government; Mr. Nussbaum, Mr. Lewis, Mr. Davis, Mr. Sheldon and Mr. Smouha for the Defendants.

THE COURT: Fifteen days ago, on January 9th of this year, pursuant to a scheduled proceeding, the four corporate defendants, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, collectively referred to as the BCCI defendants, appeared in open court.

Brian Smouha, in his authority as court-appointed fiduciary and as designated representative of the other court-appointed fiduciaries, also collectively court-appointed fiduciaries, tendered the Defendants' guilty pleas to the superseding information which had been filed in this Court on December 19th, 1991. That superseding information, in essence, charges the BCCI defendants with conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code, Sections [3] 1962(c) and 1962(d), and aiding and abetting under Section 2 of that title.

The written plea agreement between the United States of America and the four BCCI defendants was also filed that date, and in accordance with the Federal Rules of Civil Procedure, Rule 11(e)(1)(C), the parties have agreed that the specific sentence set forth in that plea agreement, including the forfeiture provisions, is the appropriate disposition of the case.

The Court makes the following findings:

By their guilty pleas in this United States District Court for the District of Columbia, the BCCI corporate defendants have expressly made waivers of venue and have proceeded to their guilty pleas by way of a superseding information, expressly waiving their constitutional rights to

indictment and trial either by jury or by the Court. They have further expressly waived other constitutional rights, in written form and orally at the January 9th hearing, including, inter alia, the right to confrontation, to cross-examination, to put the Government to its burden of proof, and to elect whether or not to put on a defense. They have further expressly waived their rights of appeal.

All of the Defendants' waivers have been made knowingly and voluntarily, with full and informed understanding of the nature, contents and consequences of the pleas. The Defendants' [4] guilty pleas have followed valued advice of their various counsel, proclaimed satisfactory to the Defendants.

The Defendants are competent to make these guilty pleas which have been tendered by the court-appointed fiduciaries through Mr. Smouha. Those court appointments are recognized and accepted by this Court.

There have been no promises, threats, coercion, or duress of any kind made to the Defendants in the process that led to the plea agreement or in the tendering of that plea agreement.

The written plea agreement constitutes the full agreement of the parties. It sets forth their entire understanding and includes the written memorandum of intent filed also on December 19, 1991. And all parties have further agreed and accepted at the January 9th hearing their understanding that, in addition to other provisions of the specific sentence agreed upon, there would be, under 18 U.S.C. 3013(a)(2)(B), a $200 assessment for each defendant in each count of this information upon entry of conviction.

There is a full and detailed factual predicate for the guilty pleas. The BCCI corporations, as they have stated through their court-appointed fiduciaries, are pleading guilty because they are in fact guilty of the serious offenses and each of the underlying acts charged in the superseding information.

The BCCI defendants have not only agreed to plea guilty [5] and have done so, but urge the Court to accept

their guilty pleas and the proposed sentence. The United States of America joins in urging the Court to accept those pleas of guilty and the proposed disposition.

The BCCI defendants and the United States of America have articulated at length in their plea agreement, at the January 9th hearing, and again through their more recent responses to nonparty filings, their precise views as to why in the public interest this Court should accept the guilty pleas and the accompanying proposed specific sentence.

Additionally, although 18 U.S.C. 1963(i) expressly prohibits nonparties from intervening in this criminal case, except as provided in Subsection (1), this Court has considered each of the submissions timely made by the persons or entities not parties to this criminal proceeding.

The Court realizes, as Mr. Nussbaum articulates so well in one of his written submissions, that, quote, there is no agreement that can be reached which would satisfy all of the diverse and irreconcilable parochial interests, end quote, that exist in this case. Nonetheless, the plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to [6] locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.

Upon consideration of the views of the parties and the nonparties to this case, the Court concludes that acceptance of the plea agreement is in the public interest. The agreement permanently incapacitates BCCI from ever again doing business in the United States, except, of course, as part of the liquidation proceedings currently pending.

Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's

wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

The plea agreement provides for the rehabilitation of United States financial institutions harmed by BCCI's criminal activity. Infusion of capital gained pursuant to the agreement will largely minimize the cost of potential damage inflicted by BCCI upon United States banks and other financial institutions and will help to ensure the viability of those institutions.

Importantly, the plea agreement resolves all criminal [7] litigation against BCCI in the United States and, consequently, avoids the high cost of protracted and expensive litigation against those corporate defendants. Moreover, the agreement secures the continuing cooperation of BCCI's court-appointed fiduciaries in the investigation and prosecution of individuals involved in related criminal activity. Such facilitation will result in the massive release of documents not otherwise readily obtainable, if at all, and, as a result, will most likely assist in bringing culpable individuals to justice while substantially increasing the amount of assets available to creditors.

Accordingly, in furtherance of the public interest and at the request of the parties, the Court accepts the four corporate BCCI defendants' pleas of guilty and the plea agreement between those defendants and the United States of America, and will embody in the judgemnt and sentence the disposition provided for in the plea agreement.

The Court finds further that there is in the record information sufficient to enable the meaningful exercise of sentencing authority without the requirement of a presentence investigation and report, and therefore will proceed directly to the sentencing.

But first, unless waived, the parties and counsel are always afforded an opportunity to speak at time of sentence. Mr. Smouha, as the court-appointed fiduciary for

the four BCCI corporate defendants, is there anything further you wish to say [8] at this time of sentence?

MR. SMOUHA: No, Your Honor. Nothing further.

THE COURT: All right.

Mr. Nussbaum, as counsel, is there anything further you wish to say, sir?

MR. NUSSBAUM: Nothing further, Your Honor.

THE COURT: Mr. Raphaelson, on behalf of the United States of America, anything further you wish to say, sir?

MR. RAPHAELSON: No, thank you, Your Honor.

THE COURT: As to the sentence. As to each of the BCCI corporate defendants, that is, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, the Court enters a judgment of conviction on the pleas of guilty to 18 United States Code, Sections 1962(c) and 1962(d) and 18 United States Code, Section 2.

In consideration of the forfeiture provisions, which will hereafter be reflected in a separate order, there will be no additional fine. Each of the corporate BCCI defendants is assessed for the mandatory victim assistance fund, and pursuant to 18 U.S.C. 3013(a)(2)(B), the sum of $200, to be paid within 60 days.

The order of forfeiture will be entered momentarily. And with that order of forfeiture, the provisions of 18 United [9] States Code, Section 1963, become the vehicles through which the claims of the nonparties may be addressed. As counsel have repeatedly said, and the Court agrees, there should be no interest of BCCI or the United States of America in forfeiture of property that properly belongs to others.

The parties have given their assurance that there will not be needless litigation over any (1) claim issue that may come before the Court. And if the (1) claimants reflect the same spirit of energy and cooperation that has

sparked the way and has led the parties to this day, that is, the parties, the other signatories and other courts, then that prophecy can be realized.

The worldwide collapse of BCCI six months ago has brought enormous and continuing tragedy to innocent victims. Fraud and mismanagement by BCCI's former operators ripped through the economic security of more than one million depositors and creditors. It is a fact that whatever is done here today, we cannot now, and not even eventually, completely erase that tragedy. But no one has offered the Court a better alternative than the one accepted by the Court.

We shall, each of us, do the best possible for the most. The judgment entered today, with the accompanying order of forfeiture, opens those doors.

There will be a brief pause.

The order of forfeiture has been signed. Copies of [10] that order of forfeiture, after they have been stamped by my Deputy Clerk, will be made available for those who might have some interest in them.

I wish you all good day.

(Proceedings concluded at 10:15 a.m.)